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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1445

ELVIN LEE BYNUM, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 74-6411

IRVING BIRNBAUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals' first opinion in this case, remanding to the district court, is reported at 475 F. 2d 832 (Pet. App. A). The district court's findings and opinion on remand are reported at 360 F. Supp. 400 (Pet. App. B). The next opinion of the court of appeals, affirming petitioners' convictions, is reported at 485 F. 2d 490 (Pet. App. C). The memorandum decision of this Court vacating the judgments of con-

viction and remanding to the court of appeals is reported at 417 U.S. 903 (Pet. App. G).

The court of appeals in turn remanded again to the district court (Pet. App. H). The district court's subsequent findings and opinion are reported at 386 F. Supp. 449 (Pet. App. I). The opinion of the court of appeals again affirming petitioners' convictions is reported at 513 F. 2d 533 (Pet. App. J).

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1975. A petition for rehearing was denied on April 25, 1975 (Pet. App. K). The petition for a writ of certiorari in No. 74-6411 was filed on April 25, 1975.[1] The petition in No. 74-1445 was filed on May 16, 1975.[2] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the wire interceptions involved in this case were unlawful because the government failed to

[1] Although petitioner Birnbaum filed a separate petition (No. 74-6411), he also joins in the petition filed on behalf of all other petitioners in this case (No. 74-1445). The separate petition filed by Birnbaum states certain issues presented for review without supporting argument, and apparently was filed only to insure compliance with the time requirements of Rule 22(2) of the Rules of this Court. Unless otherwise noted herein, reference to petitioners' arguments and corresponding portions of their petition refers to petition No. 74-1445.

[2] Inasmuch as petitioner Altamura apparently did not join in the petition for rehearing before the court of appeals (Pet. App. 143a), the petition for a writ of certiorari is untimely as to him under Rule 22(2) of the Rules of this Court.

demonstrate the inadequacy of other investigative procedures.

2. Whether the government failed to minimize the interception of irrelevant conversations.

3. Whether certain wire interceptions were improperly authorized by Justice Department officials.

STATEMENT

1. A three-count indictment returned in the United States District Court for the Southern District of New York on October 13, 1971, charged petitioners and four others with conspiring to obtain and sell narcotics in violation of 26 U.S.C. (1964 ed.) 4705(a) and 7237 (b) (Count I).[3] Petitioner Nedd was also charged with unlawfully carrying a firearm in the commission of the conspiracy, in violation of 18 U.S.C. 924 (Pet. App. 3a–4a; T. 17–22).[4] Following a jury trial, all petitioners were found guilty as charged.[5]

[3] Other defendants named in Count I of the indictment were Lillian Everett Bynum, Charles Moody, Michael Lebbers and John Feroldi. Lillian Bynum's trial was severed on motion of the government. Moody testified as a government witness at trial and later pleaded guilty to an information charging him with participation in the conspiracy in question. Lebbers' motion to dismiss the counts against him was granted by the court (Pet. App. 4a, n. 2). Feroldi's conviction on the conspiracy count was affirmed by the court below; he has not joined in the instant petition (Pet. 8, n. 3a).

[4] "Pet. App." refers to the appendix filed with petitioners' petition. "T." refers to petitioners' seven-volume appendix filed in the court below, and "H." refers to the four volumes of testimony and documents from the first evidentiary hearing conducted pursuant to the court of appeals' remand on the minimization issue. All of these volumes have been certified to the Court by petitioners (Pet. 2, n. 1).

[5] The sentences imposed on the various petitioners are set forth at Pet. App. 3a–4a, n. 1.

The evidence at trial is briefly set forth in the second opinion of the court of appeals (Pet. App. 52a–57a) and is not in dispute. In summary, the evidence showed that petitioners Bynum and Cordovano were the key figures in a conspiracy to obtain, process, and distribute large amounts of narcotic drugs that had been unlawfully imported into the United States. Bynum was the banker, and he and Cordovano supervised the supply, cutting, packaging and distribution of the drugs. Petitioners Wright, Small, Mitchell, Garnett, and Dyson were distributors; and petitioners Coniglio, Mele (or Meli), Altamura, Birnbaum, and Tuzzolino were the suppliers for the ring.

The evidence of this widespread conspiracy, which also included plans for robberies for the purpose of procuring drugs and planned murders of suspected informants, came chiefly from a government informant, Stewart. His testimony was corroborated by physical surveillance and by written transcripts and recordings of telephone conversations obtained through electronic surveillance on two telephones at the residence of petitioner Garnett, which was the "nerve center" of petitioners' "massive criminal operation" (Pet. App. 4a–5a, 17a).

2. There were three separate applications and orders involving these two telephones. On January 29, 1971, Judge Anthony J. Travia of the Eastern District of New York authorized electronic surveillance of one telephone (#212–342–6203) for the ensuing twenty days, or until February 17. Petitioner Bynum learned of the planned surveillance before it was initiated; intercepted conversations over that line indicated that

another telephone (#212–346–5992) had been installed on the premises, and that Bynum was directing his incoming calls to that line (Pet. App. 23a). The government thereupon applied for authorization to intercept communications over the new line, and on February 12, 1971, Judge Travia issued an order granting such authorization for a period of twenty days, or until March 3, 1971 (Pet. App. 23a, 115a).

The government then requested the court to extend its authorization for interception over the first line (which expired February 17) so that surveillance of both lines would continue until the termination date of the second authorization on March 3. On February 18, 1971, Judge Travia entered an order authorizing such an extension (Pet. App. 116a). Although the application for the extension, and the court order granting it, stated that former Assistant Attorney General Will Wilson had authorized the application, it was established that in fact the request for the extension order had been approved by Sol Lindenbaum, former Executive Assistant to the Attorney General.*

The government intercepted 1,974 conversations during the surveillance period (excluding 84 calls to information, weather, and similar services) (Pet. App. 39a–40a). The contents of fifteen of these conversations were introduced at trial (T. 3192–3227). Of these fifteen conversations, four were intercepted on

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*The applications and Judge Travia's orders relating to the initial interceptions over each line also stated that the applications had been authorized by Wilson; as to these applications, however, it was later established that approval had actually come directly from former Attorney General Mitchell (Pet. App. 115a; T. 54, 58, 81, 84, 120–122).

telephone #202–342–6203 during the period authorized by the extension order (Pet. App. 139a).

3. On appeal petitioners argued, *inter alia*, that electronic surveillance of both telephones was conducted in a fashion that violated both the statutory mandate and the authorizing order's requirement for minimization of interception of innocent conversations (Pet. App. 6a). Retaining jurisdiction, the court of appeals remanded the case to the district court for an evidentiary hearing on this issue (475 F. 2d 832; Pet. App. A). Following that evidentiary hearing, the district court concluded that the obligation to minimize had been properly met (360 F. Supp. 400; Pet. App. B). The court of appeals then affirmed the convictions, upholding the district court's findings on the minimization question and, in addition, rejecting petitioners' claim that the evidence of the four conversations intercepted during the extension period should have been suppressed because the application for the court order had not been approved by the Attorney General or a specially designated Assistant Attorney General, as required by 18 U.S.C. 2516(1) (Pet. App. 66a, 91a) (485 F. 2d 490; Pet. App. C).

On May 28, 1974, this Court vacated petitioners' convictions and remanded the case to the court of appeals for further consideration in light of *United States* v. *Giordano*, 416 U.S. 505[1] (417 U.S. 903; Pet.

[1] In *Giordano*, the Court held an application authorized by the Executive Assistant to the Attorney General failed to comply with the requirements of 18 U.S.C. 2516(1) and that suppression of evidence obtained pursuant to an order based on such an improperly authorized application was required under the provisions of 18 U.S.C. 2515 and 2518(10)(a)(i) (Pet. App. 91a, 103a–104a).

App. G). The court of appeals, upon the government's motion, remanded the case to the district court for reconsideration in light of *Giordano* and of *United States* v. *Chavez*, 416 U.S. 562[8] (Pet. App. H).

At a hearing, the district court ruled that, notwithstanding that the Executive Assistant, rather than the Attorney General or a specially designated Assistant Attorney General, had authorized the application for the extension order, the particular facts of this case distinguished it from *Giordano*, and the interceptions over telephone #212–342–6203 during the extension period were lawful. The court held that this result could be reached on either of two grounds.

First, the district court held that the personal approval of the Attorney General was unnecessary in respect to applications for extensions: so long as the Attorney General had personally approved the initial application, compliance with the statutory scheme was established, since the duration of the interception was a matter committed primarily to the discretion of the judge who issued the initial order (Pet. App. 118a, 120a–124a).

The district court held in the alternative that, in any event, the peculiar facts of this case show that the Attorney General had in effect authorized the extension application, since the two lines were for all practical purposes a "single unit" and the Attorney Gen-

[8] The Court determined in *Chavez* that, where the Attorney General had personally approved an application for a court order authorizing electronic surveillance, the misidentification of the authorizing official as an Assistant Attorney General in the application and resulting court order did not warrant suppression of evidence seized pursuant to the court order.

eral had authorized the tap of the second line through the period covered by the extension of interceptions on the first line. In this regard the court pointed out that, upon learning of the second telephone, the government had intended, with the Attorney General's specific authorization, to monitor both telephones in tandem, and indeed had applied initially, again with the Attorney General's approval, for an order allowing them to place a recording device on the premises of 855 Linden Boulevard so that oral communications as well as wire communications might be overheard (Pet. App. 124a–129a).[9] On these facts the district court held that both statutory and constitutional standards had been met, and that, accordingly, suppression of the intercepted conversations and their investigative fruits was not required (Pet. App. 136a).

The court of appeals then affirmed petitioners' convictions (513 F. 2d 533; Pet. App. J), but on reasoning different from the district court's. It held, first, that all of the defendants other than Bynum, Cordovano, and Garnett lacked standing as "aggrieved persons" under 18 U.S.C. 2510(11) and 2518(10)(a) to contest the admissibility of the four conversations intercepted during the extension period. The court then ruled (Pet. App. 140a):

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[9] The district court found that the Attorney General had also mentioned interceptions of oral communications in his February 11, 1971, authorization of the application for an order allowing wire interceptions over the second telephone (Pet. App. 129a).

The district court on January 29 authorized the placing of such a device on the premises, but the government decided it was too dangerous and abandoned the idea (Pet. App. 23a, n. 6).

> Although we agree with Bynum's and Cordovano's contention that 18 U.S.C. 2518(5) contemplates an authorization procedure for extensions similar to that required for initial applications, we conclude that the contents of the four extension recordings introduced were merely cumulative as to them.[10]

The court likewise found (Pet. App. 139a) that "any error as to Garnett" stemming from introduction of the four intercepted calls "was harmless."

ARGUMENT

1. Petitioners contend first that the applications failed to establish the necessity for a wire interception as required by 18 U.S.C. 2518(1)(c) (set forth at Pet. App. 96a), because the investigators had ample information on which to arrest Bynum, the main target of the interception, without relying on additional information that the interceptions might reveal (Pet. 10, 28–30). While we agree that the affidavits stated facts sufficient to constitute probable cause for the arrest of Bynum before the interceptions were authorized, this does not preclude issuance of the intercept order where, as here, the investigation was directed

[10] In a footnote the court pointed out (Pet. App. 140a, n. 2) that 18 U.S.C. 2516(1), providing that the Attorney General may authorize an interception order when an interception "may provide or has provided evidence" of specified crimes, appears to apply, *inter alia*, to authorizations in connection with previously conducted interceptions. The court also noted that Section 2518(5) incorporates the requirements of Subsections (1) and (3), which call for the identification of the authorizing officer, and that under Section 2516 only the Attorney General or an Assistant Attorney General specially designated by him may act as authorizing officers.

at discovering the identity of the other persons involved in a major, wide-spread conspiracy. *United States* v. *Armocida,* 515 F. 2d 29, 37–38 (C.A. 3), pending on petitions for writ of certiorari, Nos. 74–6683 and 74–6686; *United States* v. *Staino,* 358 F. Supp. 852, 857 (E.D. Pa.); see *Hoffa* v. *United States,* 385 U.S. 293, 310. Furthermore, the facts in the affidavits were largely based on information from informants and included sufficient reasons to believe that these informants would refuse to testify against Bynum, thereby further establishing the necessity for the wire interceptions (H. 627–629). *United States* v. *Leta,* 332 F. Supp. 1357, 1362 (M.D. Pa.).

2. Petitioners allege (Pet. 30–35) that the monitoring agents failed to minimize the interception of irrelevant, innocent conversations, thereby violating both the order authorizing the wiretaps and the statute requiring such minimization, 18 U.S.C. 2518 (5). Upon the initial remand of the case to the district court for an evidentiary hearing on this issue, Judge Pollack conducted an "exhaustive analysis" (Pet. App. 67a) of the testimony and documentary evidence adduced at that hearing and concluded that the agents' efforts at minimization in this case complied with all requirements. The evidence substantiating that conclusion shows that the information known to investigating officers at the outset of the interceptions was that Bynum was successfully operating a "far flung narcotics trade" centered in Brooklyn, New York, and reaching to Boston, Baltimore, Washing-

ton, Atlanta, and areas of Virginia (Pet. App. 15a–16a). Such a vast illicit organization involved numerous unknown co-conspirators and was believed to involve the aid and protection of local and federal law enforcement officers, as well as certain attorneys (Pet. App. 15a–16a).

In light of these facts, the government sought authorization to intercept a telephone in a residence occupied by Bynum with petitioner Garnett, and identified as the center of the operation (Pet. App. 17a). In considering a plan to minimize the interception of innocent conversations, Assistant United States Attorney Updike, who was supervising the investigation, was faced with the following considerations:

1. The premises involved were the nerve center of a massive criminal operation, and the telephone at that location would be heavily relied upon as a means of communication with co-conspirators, so that innocent conversations passing over the telephone would be minimal (H. 40–42, 302, 625–627; Pet. App. 17a–18a, 69a).
2. With a vast number of unknown conspirators involved, there would be difficult problems of speaker identification, as well as problems arising out of the dialect of members of the narcotics operation (H. 345–347).
3. Most illicit telephone conversations would appear innocent on their face, and their relevance would become apparent only upon consultation with informants or when corre-

lated with physical surveillance (H. 42–43, 344).[11]

4. Many otherwise innocent conversations would contain information concerning the whereabouts and activities of the co-conspirators, which would be a considerable aid to the physical surveillance part of the investigation (H. 111, 212–213).

Updike discussed the problem of minimization extensively with his colleagues, and consulted the relevant statute and the guidelines set forth in the Justice Department manual on wire interceptions (H. 36–39). The minimization requirement was also discussed by Updike, Bureau of Narcotics supervising agents Taylor and Bitzer, and Judge Travia at the time the initial application was made, and at numerous meetings thereafter (H. 409–410). Judge Travia agreed that it would be impossible at the outset to set specific rules for minimization in the unique circumstances of the case, and that the agents would have to use their discretion in minimizing the interception of innocent conversations to the greatest extent possible, consistent with the needs of the investigation (H. 412–414, 450–453).

Updike thereafter instructed the monitoring agents that all telephone calls would be monitored and recorded at the outset, "except communication they in

[11] The investigators knew petitioner might have corrupted law enforcement officials (Pet. App. 15a–16a, 31a); thus it was reasonable to suppose he would learn of the interceptons and that telephone conversations would be extremely guarded. Bynum in fact did learn of the planned surveillance before it was initiated (Pet. App. 23a).

their judgment felt was a privileged communication, and if they heard or intercepted communications that fell into that latter category, they were to call it to my attention" (H. 33, 39, 266).

As the monitoring progressed, Updike was kept informed of developments by Agents Taylor and Bitzer, who were directly supervising the monitoring agents (H. 216, 342–343, 362). In addition, he personally examined the logs of the conversations on a periodic basis (H. 175, 187–188). During the course of the interceptions, Updike reexamined his policy of total interception, based upon his examination of the logs and his discussions with the monitoring agents. He was aware that conversations of a babysitter named Donna had been intercepted, and that some of these conversations described activities of the conspirators which provided useful leads (H. 80–82). Although Updike gave "explicit consideration" to the possibility of terminating the interception of Donna's conversations, he decided in light of all the circumstances not to change his instructions (H. 82).[12]

Updike also became aware that some of petitioner Garnett's calls were innocent in nature, but he determined to continue total interception of her calls because Garnett was plainly deeply involved in the conspiracy, and there was a considerable likelihood that, at some time during an otherwise innocent conversation, she would say something which would be useful to the investigation, such as the identification

[12] One such circumstance was that Donna was originally suspected of being involved in the drug conspiracy (H. 1084–1085, 1811).

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of other persons involved in the ring (H. 197–198).

Concerning the Donna and Garnett conversations, Updike stated (H. 198):

> They [the monitoring agents] also had the discretion not to listen if they thought that it would not be productive to continue listening, and I felt that under all of the circumstances that that was adequate.

In that regard, Agent Pryal,[13] who was involved in the monitoring of the telephone calls, testified that after the monitoring agents had become familiar with the parties to Donna's calls, they "listened to part of the conversation, determined who the parties were from voices, et cetera, and then, when it became most probable that it was just kids talking, we would take the earphones off and leave the recorder on" (H. 402). Pryal estimated that approximately 10% of the total conversations were not monitored by the agents; all conversations were recorded (H. 393).[14]

Throughout the duration of the interceptions, Judge Travia was kept informed of the progress of the in-

[13] It was stipulated that the other monitoring agents, if called to testify, would testify in a manner similar to Agent Pryal (H. 485–486).

[14] It was Updike's decision that all conversations should be recorded, even though the monitoring agents might deem them irrelevant. He made this decision principally to insure that "there could be no accusations at a later time that the government had made selective recordings * * *," *i.e.*, that it had omitted exculpatory conversations (H. 167–168; Pet. App. 30a). The privacy of innocent parties was to be protected by the fact that the recordings were sealed and delivered to the custody of the supervising judge (H. 42; Pet. App. 20a, 30a–31a, 33a). The conversations that the agents did not monitor were never overheard by anyone until the tapes were played by the parties in

vestigation through written and oral reports.[15] The written reports contained information concerning the number of calls intercepted, the number of relevant calls, and specific information learned from certain calls. In addition, each report contained the intercept logs for the period covered by the report (Pet. App. 36a–37a; H. 635–638, 677–680, 718–720, 722–726).

The interception lasted 34 days on one phone and 14 days on the other, and a total of 2,058 calls were recorded by the monitoring agents.[16] Only 501 calls lasted more than three minutes.[17] Of these, approximately 71 involved Donna talking with a party who was not a suspected conspirator (Pet. App. 39a–40a). It is obvious from Agent Pryal's testimony that the 10% of the conversations which were unmonitored included a great many of Donna's (H. 393, 399, 400–401). Although we agree with the district court that statistical analyses must be considered with caution (Pet. App. 38a), the above data, which are not in dispute (Pet. 25), show that the agents did in fact

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the case during the hearing on minimization. The merits of such a policy of recording all conversations were recognized in *United States* v. *Manfredi*, 488 F. 2d 588, 600, n. 9 (C.A. 2), certiorari denied, 417 U.S. 936.

[15] Although the authorizing orders called for reports to be submitted to Judge Travia at five-day intervals, the oral reports were more frequent (H. 408).

[16] 84 of these calls were to information, weather, and similar services.

[17] Petitioners agree with the district court that calls of very brief duration must be monitored *in toto*, since it takes the monitoring agents some time to identify the parties and determine the nature of the conversation (Pet. App. 39a–40a; Pet. 23). See *United States* v. *Armocida*, *supra*, 515 F. 2d at 45.

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succeed in effectively minimizing the monitoring of Donna's calls.

Petitioners also assert that the interception of calls involving petitioner Garnett to which no other conspirator was a party constituted an abuse of the minimization requirement (Pet. 24–25). In view of the fact that Garnett's involvement in the conspiracy was known to the agents, the monitoring agents acted reasonably in monitoring nearly all of Garnett's conversations.[18]

Courts that have dealt with the minimization question have recognized the particular problem involved where, as here, the object of the interception is to uncover information concerning large-scale conspiracies involving numerous unknown co-conspirators. See *United States* v. *Armocida, supra,* 515 F. 2d at 44, 45; *United States* v. *Cox,* 462 F. 2d 1293, 1300–1301 (C.A. 8), certiorari denied, 417 U.S. 918; *United States* v. *LaGorga,* 336 F. Supp. 190, 195–197 (W.D. Pa.); *United States* v. *Manfredi, supra,* 488 F. 2d at 599–600. In a case such as this, it is impossible for the supervising judge to give "detailed screening instructions which could effectively minimize licit telephone interceptions," *United States* v. *Manfredi, supra,* 488 F. 2d at 600, and the giving of general instructions is sufficient to comply with the mandate of 18 U.S.C. 2518(5). *United States* v. *Fino,* 478 F. 2d 35, 37 (C.A. 2), certiorari denied, 417 U.S. 918.

[18] Pryal testified that he had on occasion ceased monitoring Garnett's conversations (H. 350); presumably other agents did the same.

The statute does not proscribe the interception of all nonpertinent calls, and there is no failure to minimize simply because, in retrospect, it appears that a substantial portion of the intercepted calls had no evidentiary or investigative value. *United States* v. *Scott*, 516 F. 2d 751 (C.A.D.C.); *United States* v. *James*, 494 F. 2d 1007 (C.A.D.C.), certiorari denied *sub nom. Jackson* v. *United States*, 419 U.S. 1020; *United States* v. *Cox*, *supra*, 462 F. 2d at 1300–1301; *United States* v. *Lanza*, 349 F. Supp. 929 (M.D. Fla.); *United States* v. *Curreri*, 363 F. Supp. 430, 437 (D. Md.).

In light of the circumstances of this case, where a vast, highly sophisticated narcotics conspiracy was under investigation that involved numerous unknown conspirators, where the supervising judge was kept intimately informed of the manner in which the interceptions were being executed by supervisory personnel, and where both the agents and the judge gave careful attention to the question of minimization, the court of appeals was correct in concluding (Pet. App. 73a) that the requirements of 18 U.S.C. 2518(5) were met.[19]

3. Petitioners' final contention (Pet. 38–44) is that

[19] Petitioners argue that even if the agents' efforts at minimization complied with statutory requirements, the interception in this case was the type of general search prohibited by the Fourth Amendment (Pet. 42–44). This argument is insubstantial, in light of the many decisions that have upheld the validity of 18 U.S.C. 2510–2520 against challenges that the statute permits an unconstitutionally broad general search. See, *e.g.*, *United States* v. *Best*, 363 F. Supp. 11, 15, n. 3 (S.D. Ga.), and cases cited therein. See also *United States* v. *Kahn*, 415 U.S. 143, 151.

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the court of appeals, assuming that the extension was improperly authorized, erred in ruling that the admission of four conversations intercepted during that period was harmless error (Pet. App. 139a–141a). In this regard, petitioners also challenge the court's ruling (*id.* at 139a) that all petitioners other than Garnett, Bynum, and Cordovano lack standing to contest the interceptions (Pet. 44–47).

In our view, the court of appeals' rulings in these respects were correct, although, as we point out below, these issues need not be reached because the interceptions during the extension period were lawfully conducted.

As to standing, petitioners would have the Court believe that each of them can establish entitlement to object to the extension interceptions as an "aggrieved person" within the meaning of 18 U.S.C. 2510(11) and 2518(10)(a). But petitioners Coniglio, Meli, Altamura, Birnbaum, and Tuzzolino were never overheard on either telephone at any time, and can demonstrate no interest in the property at 855 Linden Boulevard. Accordingly, they have no standing to complain of the interceptions. *Alderman* v. *United States,* 394 U.S. 165.

Similarly, as to the four extension period conversations introduced at trial, the remaining petitioners, except Garnett, the owner of the premises, and Bynum and Cordovano, the conversants, have no standing. *Alderman* v. *United States, supra.*[20]

[20] Cordovano's and Bynum's participation in the conspiracy was well established through evidence of events which occurred prior to February 18, 1971, the beginning date of the extension period interceptions. Accordingly, the court of appeals, after

The remaining petitioners (Wright, Small, Mitchell, Dyson, and Nedd) argue that they should have standing to complain of interceptions, during the extension period, of conversations not introduced at trial. But this is beside the point because petitioners completely failed to allege even a single instance where such an interception led to evidence against them or prejudiced them in any way.[21] Since before the district court's hearing on the first remand (April–May, 1973), pe-

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its own independent examination of the record, was correct in concluding (Pet. App. 140a–141a) that the evidence revealed by the four conversations that were introduced was merely cumulative as to them. Garnett's involvement was also established before February 18, 1971; in any event, she can have no objection to the introduction of these four calls because, as the court of appeals noted (Pet. App. 139a), none of them "referred to her directly or indirectly, and it was never claimed that they constituted proof of her participation in the conspiracy."

[21] Contrary to petitioners' assertion (Pet. 39–42), there is no inconsistency between the government's position with respect to its minimization efforts and its argument that any error in connection with the interceptions during the extension period was harmless. As we have shown above (*supra*, pp. 16–17), the government's efforts at minimization are legitimately informed at the time of the interceptions by its reasonable suspicions about the scope of the criminal enterprise under investigation and the likelihood that conversations to be intercepted will produce evidence of the illegal activity. Thus at the district court hearing on minimization the Assistant United States Attorney who supervised the interceptions testified, as petitioners point out (Pet. 40), that he allowed interceptions of seemingly innocent conversations to continue because the information gained from them "can be of extreme evidentiary value."

It is quite another thing to say, after the fact, that all of the calls the government might intercept consistent with minimization requirements *actually did* produce evidence, or investigative leads to other evidence, which was used to convict petitioners.

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titioners have had available to them, and in connection with their claims relating to minimization have made extensive use of, the logs of the government agents who monitored the interceptions. These logs list every call intercepted, its date and duration, the participants (where they could be identified), and the gist of the conversation overheard.[22] The government's harmless error argument was raised in the district court on the second remand (November, 1974). Petitioners have thus had ample opportunity to show, but have not shown, either in the district court, the court of appeals, or here, that the interception of any call during the extension period to which they were party led to evidence against them which should not have been introduced at trial. The court of appeals correctly upheld the government's position in respect to harmless error "without reference to the investigatory use of the many conversations seized by the extension tap" (Pet. 39).[23]

In any event, the court below reached these issues

[22] Petitioners were also given copies of each "Report of Investigation" prepared by agents of the Bureau of Narcotics and Dangerous Drugs investigating this case between January 25, 1971 and March 16, 1971. These reports clearly indicate the progress of the investigation and all sources of information, whether obtained from visual surveillance, informants' advice, or the intercepted conversations. These reports and the logs of the intercepted conversations appear in volume 3 of the four volumes of hearing testimony and exhibits in connection with the district court hearing on minimization, see note 4, *supra*.

[23] Indeed, the only evidence of record on this issue is the testimony of Agent Handoga, one of the Drug Enforcement Administration agents most actively involved in the investigation of this case, that during the extension period most of the information that he received came from a government in-

of standing and harmless error only because it assumed that the interceptions during the extension period were unlawful. In our view, however, they were lawful: the district court correctly treated (Pet. App. 124a–136a) both telephones in the Garnett residence as a single unit.[24]

The Attorney General personally authorized the application for an order allowing interceptions over the first (and, at the time, only) telephone. The application was granted by Judge Travia on January 29, 1971: its expiration date was February 17, 1971. Bynum had learned of the planned surveillance, however, and had another telephone with a different number installed at the same premises before Judge Travia signed the order (Pet. App. 66a, n. 4; H. 655). When through interceptions over the first line the government learned of the existence of the second, the decision was made, again by the Attorney General himself, to apply for an order authorizing interceptions over the new line. The Attorney General approved the application on February 11. On February

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formant who was a member of the drug ring, and that he could recall no information that came from the wire interceptions (Hearing of October 10, 11, 1974, at 30–32).

[24] The court of appeals noted its agreement with petitioners "that 18 U.S.C. § 2518(5) contemplates an authorization procedure for extensions similar to that required for initial applications" (Pet. App. 140a; footnote omitted), and in so doing overruled the first ground of the district court's holding that the extension interceptions were properly authorized (*i.e.*, that the personal authorization of the Attorney General was unnecessary for extensions of interceptions initially authorized by him). The court of appeals did not refer, however, to the district court's alternative ground, which we urge was correct, that the two telephones were in effect a single unit.

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12 Judge Travia granted it: its expiration date was March 3. Thereafter, on February 18, the government applied for, and Judge Travia granted, authorization to extend the time allowable for interceptions over the first line to coincide with the period authorized for surveillance of the second.

Although the extension application was approved by the Executive Assistant rather than by the Attorney General, we think it plain that the Attorney General had authorized electronic surveillance, of both the telephones and premises at 855 Linden Boulevard,[25] until March 3, and that, accordingly, the interceptions over line one during the extension period were not

[25] The papers sent to the Attorney General seeking his authorization for the second application to Judge Travia were accompanied by a covering memorandum of Executive Assistant Sol Lindenbaum to the following effect:

"On January 26, 1971, you approved a request by BNDD to tap the phone in the residence of Elvin Lee Bynum, a major narcotics dealer in Brooklyn who is suspected of engaging in operations that entail payoffs to New York City police and BNDD agents. You also approved an application for an order to install a microphone in Bynum's residence. BNDD obtained the order for both the tap and the bug but up to now has not been able to install the latter.

"Intercepted telephone conversations have confirmed Bynum's narcotics dealings only to a limited extent. It turned out that Bynum put a second phone in his home shortly before the tap began and is apparently receiving his more important business conversations on the new phone. *BNDD wants a 20-day tap on this new phone along with a new 20-day order for a bug to supersede the old order.*

"I agree with the Criminal Division that the statutory requirements of probable cause are met here."

(Government Exhibit PA8; pp. 168, 301, of the transcript of the October 10, 11 and November 9, 1974 hearing in the district court on the second remand; see the government's supplemental brief on their most recent appeal, at 7–8).

unlawful within the intent of Title III. The district court found as facts (Pet. App. 118a) that the

> two telephones were subscribed for in the same name * * *, located in the same private residential one family premises, and used by the same individuals for the same illegal purposes * * *

The district court also found (Pet. App. 119a) that the government's intention in this case, personally endorsed by the Attorney General, was to intercept all communications over all residential phone facilities in the premises during the period February 12 to March 3. Accordingly, the district court held (*ibid.*):

> Thus Attorney General Mitchell's personal approval on February 11, 1971 considered in light of all the circumstances, including his personal approval of the objective given on January 26, 1971, in effect authorized whatever application was necessary to pursue interception of communications over both telephones during the period February 12, 1971 to March 3, 1971, and the February 12, 1971 order *itself* in effect granted authority for a tandem or simultaneous tap on both phones. [Emphasis in original.]

This result is consistent with *United States* v. *Giordano, supra.* The decision to intercept wire communications at the Garnett residence, and indeed the decision to intercept them until March 3, were made personally by the Attorney General. Thus, "[t]he mature judgment of a particular, responsible Department of Justice official [was] interposed as a critical precondition" (416 U.S. at 515–516) to the judicial orders authorizing wire interceptions from January 29 until March 3. Given the identity of the users of and

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communications passing over both telephones, we submit that in this case there was full compliance with the congressional intent "to condition the use of intercept procedures upon the judgment of a senior official in the Department of Justice that the situation is one of those warranting their use" (*id.* at 527). In short, the safeguards of the statutory scheme were satisfied in all meaningful respects by the Attorney General's screening and approval of the interception applications covering the entire period from January 29 to March 3, and the interceptions over the first line during the extension period were accordingly not unlawful.[26]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for a writ of certiorari should be denied.

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AUGUST 1975.

[26] In addition to the issues raised in Pet. No. 74–1445, petitioner Birnbaum poses the question, without supporting argument, "whether the question of multiple conspiracies should void" his conviction (Pet. No. 74–6411, at 2, 4). But the court of appeals concluded that the government's evidence proved the existence of a single, rather than multiple conspiracies (Pet. App. 57a–61a), and petitioner suggests no reason why this holding was incorrect, or, if it was, how the variance prejudiced him. Further review of this issue is therefore not warranted.

U.S. GOVERNMENT PRINTING OFFICE: 1975